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Supreme Court, U. S.
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JUL 6 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

No. 72-1611

STANLEY V. TUCKER,

Petitioner,

-vs-

JEAN NEAL,

Respondent.

BRIEF IN OPPOSITION
** TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT **

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QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review an order of the district court denying an application filed 66 days after entry of judgment seeking an extension of time to appeal from the judgment.

STATEMENT OF THE CASE

(This statement is deemed necessary to correct inaccuracies and omissions, indeed misrepresentations, in the statement of the other side. Supreme Court Rule 40.3.

(References to the petition here and in the ARGUMENT to follow will be indicated parenthetically by "P" and the applicable page numbers.)

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Summary judgment in favor of respondent was entered in the District Court for the Northern District of California on July 21, 1972. (P 7)

Sixty-six days later (September 25) the district court received petitioner's application, on grounds of alleged excusable neglect, for an extension of time to appeal from the judgment,

together with a notice of appeal to be filed if leave were granted. (Petitioner had mailed the notice and application on September 13, but sent them in error to the Central District of California rather than the Northern District. They were returned to him, and he remailed them to the right court. [P 9])

The district court denied the application on October 20, and on November 3 petitioner appealed (to quote his notice of appeal) from "the order made and/or entered herein on or about October 20, 1972 denying Defendant's Application For Extension of Time to file notice of Appeal." (P A 1)

On March 27, 1973, the Court of Appeals for the Ninth Circuit dismissed the appeal for lack of jurisdiction. (P A 1)

Petitioner now seeks a writ of certiorari to review that dismissal.

ARGUMENT

I

Petitioner suffered the irreversible loss of his right to appeal from the judgment of the district court by lapse of time. His petition obscures the true simplicity of the case by ignoring the fact that his appeal to the Ninth Circuit Court of Appeals was not from the judgment, but from an order of the district court made three months afterward, denying him his untimely request to appeal late. Thus, there has been no appeal from the judgment and, distinguishing the extraordinary powers of this Court in a proper case, there never will be. So the case comes here not on its merits, but on an issue of subsequent jurisdiction. Most of the petition is a debate of anterior matters, and is quite beside the point.

II

For present purposes, then, the case begins with the summary judgment of July 21, 1972. Petitioner neglected to appeal within 30 days thereafter, and the right was lost. FRAppP, Rule 3(a) and 4(a). Thirty days after that, the privilege of discretionary appeal in instances of excusable neglect was likewise gone. Id. Thereupon, no appeal having been taken or sought by documents on file with the court, the judgment became final. It was not until 6 days later---i.e., 66 days from entry of judgment---that petitioner's notice and application for leave to file a late appeal were received by the court. On October 20 the application was denied by the court, not in the exercise of discretion, but in observance of a clear jurisdictional limitation: It was powerless to grant the extension of time. It was from that order that petitioner

appealed, and the appeal was dismissed.

Neither court could have acted otherwise. The appeal concerned only appealability, a matter foreclosed by law on the 60th day after judgment. Thus, the order of the district court was effectively unappealable, for appeal from a postjudgment order is precluded insofar as it seeks to challenge a judgment already final by lapse of time. Leober vs Schroeder (1893), 149 US 580, 13 S Ct 934, 37 L ed 856; see 9 Moore's Federal Practice ¶ 110.14[1], p 197.

III

A discretionary appeal must be sought by notice of appeal and motion for its allowance filed with the court by the 60th day after judgment, otherwise the appeal will be dismissed. Alexander vs Sacha (9th Cir 1971), 439 F2d 743;

see also, Torockio vs Chamberlain Mfg. Co. (3d Cir 1972), 456 F2d 1084, 1087; Pasquale vs Finch (1st 1969), 418 F2d 627, 629; Reed vs Michigan (6th Cir 1968), 398 F2d 800, 801; Evans vs Jones (4th Cir 1966), 366 F2d 772, 773. The "filing" requirement calls for timely delivery into the hands of the clerk, and nothing less will do. Casalduc vs. Diaz (Gonzalez) (1st Cir 1941), 117 F2d 915. In Torockio, supra, 456 F2d at 1086 (fn omitted), the court said: "We note that unlike most other time limits prescribed by the Federal Rules, which turn on service, timeliness of a notice of appeal turns on filing."

Petitioner tries to skirt the issue by declaring that on September 13, 1972, he "filed by mail" his notice of appeal. (P 9) He contends that his mailing of the papers within 60 days after judgment

(September 13) was sufficient; that the papers should have been deemed timely filed albeit in the wrong court, which he says is good enough, citing Yanow vs Weyerhaeuser S.S. Co. (9th Cir 1959), 274 F2d 274; and that the failure of the papers to reach the proper court in time was the result of the "inadvertence, excusable neglect, mishandling of Los Angeles District Clerk" (sic). (P 9-10)

But mailing is not filing: the latter is an event peculiar to the court house, and does not occur at the sender's mail-drop. Allen vs Schnuckle (9th Cir 1958), 253 F2d 195. In Evans vs Jones, supra, 366 F2d at 772, the court disregarded an averment that notice had been mailed in time to meet a Monday deadline, and held instead that the notice was filed when received by the court on Tuesday.

Petitioner is likewise mistaken in his assertion that transmitting the papers to the wrong court, as he did, must be overlooked. The cases so saying uphold the filing in the appellate court of papers meant for the trial court, or vice versa, but only as between courts in vertical relation. See, e.g., Jordan vs U. S. District Court (1953), 98 US App DC 160, 233 F2d 362, 365; see also, Federal Deposit Insurance Corp. vs Congregation Poiley Tzedeck (2d Cir 1946), 159 F2d 163, 166. Petitioner, however, sent his papers to the wrong district, where the case was a stranger to the court. They were thereupon returned to him, and his present assignment of blame to the clerk of the Central District is to be understood only as human temperament, not as the law.

"So far as we can find, there

has in modern times been no disposition to relax the strictness of this requirement that something must be done in the proper court to indicate an intent to review. * * * [I]f the notice of appeal is not filed with the district court within the proper time, the right is irretrievably lost * * *."
United Drug Co. vs Helvering (2d Cir 1940), 108 F2d 637, 638-639.

Petitioner's purported appeal from the order of October 20, 1972, could not retrieve the irretrievable. Nothing viable reached the court of appeals. Confronted only with an unalterable ruling from below, the court was manifestly without jurisdiction.

IV

That is all there is to the case,

and it demonstrates that the court of appeals had no alternative but to dismiss petitioner's appeal. Apparently sensing this at last, petitioner has invented a different case for presentation in his petition to this Court. Thus, he says he made a motion under Rule 60(b), FRCivP, which he complains was never ruled upon. He says it over and again: "Where Appellant timely filed a Motion under Rule 60b and where the Ninth C. A. granted a motion to dismiss without ruling on Appellant's Rule 60B motion * * *" (sic). (P 2) "This case involves Rule 60b FRCP and the denial of due process and equal protection by failure to rule on Appellant's Rule 60b motion." (P 4) "Appellant filed a Rule 60b motion based on mishandling of his notice of appeal * * *." (P 5) " * * * [W]ithout ruling on Appellant's Rule 60B. motion * * *" (sic). (Ibid.)

"WITHOUT RULING on Appellant's Rule 60b motion * * *" (sic). (P 6)

Respondent is unable to find any such motion in the case. A motion under Rule 60(b), FRCivP, is addressed to the district court for relief under certain circumstances from a judgment, order or proceeding. No motion citing that rule appears in the record. Petitioner's brief to the court of appeal, covering more than 70 pages of argument, tables and appendices, makes no mention of Rule 60(b) anywhere. On June 11, 1973, the writer directed a letter to petitioner for clarification of the matter, but has received no reply. There seems never to have been such a motion, yet petitioner would have this Court believe it was made and ignored.

Petitioner is chargeable with other misrepresentations whose natural effect

is to becloud the case and prolong it. Thus, No. 4 of petitioner's "Questions Presented" recites that he had "timely prepared and filed an Application Of Extension of Time To File Notice of Appeal * * *." (P 2) The statement is contrary to fact and argumentative at best, out of place in a statement of issues.

Petitioner alleges that his motion for enlargement of time to appeal "was timely since Appellant had until October 19, 1972 to obtain an order to extend time." (P 9) In truth he had only to September 19, 1972.

Finally, petitioner claims that respondent waived timely notice of appeal. (P 11-12) He presumes to base the argument on a letter from the writer to the clerk of the court of appeals, from which petitioner quotes out of

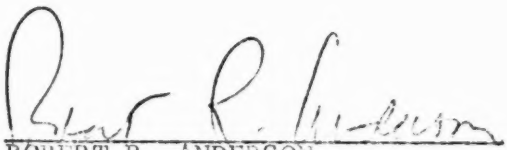
context a portion of a sentence by which respondent, as appellee, declined to file an answering brief. (P A 2) In the part of the letter omitted by petitioner, the clerk was informed that respondent had elected, in lieu of a brief, to submit the appeal on her pending motion to dismiss ---a motion which asserted, and by no means waived, petitioner's failure to appeal in time.

Conclusion

The case is routine, wholly without special or important reasons for granting certiorari. The judgment of dismissal in the court of appeals was in harmony with all pertinent decisions of this Court and of the courts of appeals, and did not in any way depart, nor sanction a departure, from the accepted and usual course of judicial proceedings. The

propriety of the ruling below is unquestionable, and the case is unworthy of the further time and attention of this Court.

WHEREFORE, respondent respectfully requests that the petition herein for a writ of certiorari to the Ninth Circuit Court of Appeals be denied.



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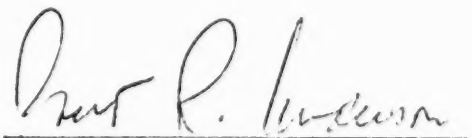
CERTIFICATE OF SERVICE

I, ROBERT R. ANDERSON, attorney for respondent in the within-entitled proceeding, hereby certify that I served the attached BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon petitioner on June 29, 1973, by depositing three (3) true copies thereof in the United States mail at Santa Paula, California, postpaid, addressed to petitioner as follows:

STANLEY V. TUCKER
963 Capitol Avenue
Hartford, Connecticut 06106



ROBERT R. ANDERSON